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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ISIDRO PENA SOTO, Defendant and Appellant.	A123133 (Solano County Super. Ct. No. FCR241319)

Defendant Isidro Pena Soto was convicted by a jury of second degree murder (Pen. Code, § 187, subd. (a), count one), driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a), count 2), driving with blood alcohol of .08 percent causing injury (Veh. Code, § 23153, subd. (b), count 3), possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 4), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 5), and gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a), count 6). The jury found in connection with counts 2 and 3 that defendant inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)), and in connection with counts 2, 3, and 6 that he had three prior convictions of driving with blood alcohol of .08 percent (Veh. Code, § 23152, subd. (b)). Defendant was sentenced to 19 years to life in prison, representing 15 years to life for murder, plus four years for transporting methamphetamine; sentences on the other counts were stayed.

Defendant contends and the People concede that the convictions on counts 2 and 3 must be reversed because they are lesser included offenses of count 6. The contested issue is whether the murder and manslaughter convictions must be reversed because the

court refused to give a special jury instruction defendant proposed on the regulations for drawing blood to test blood-alcohol concentration. We find no error or prejudice on this issue, and therefore affirm the judgment on those counts.

I. BACKGROUND

Kent Boone drove over the crest of an incline on Highway 12 in Solano County around 6:15 a.m. on March 31, 2007, and was met head on by a Ford Expedition driven by defendant. Boone died at the scene from blunt force injuries suffered in the collision.

The accident was witnessed by Anthony Brazil, who testified that he was driving east on Highway 12, a two-lane road with solid double lines in the middle, when he noticed defendant's vehicle in his rear view mirror approaching rapidly and swerving back and forth between the lanes. Brazil slowed and moved to the shoulder of the road to avoid defendant, who passed by at a speed Brazil estimated to be 85 to 90 miles per hour. As defendant went up an incline, he drifted over into the westbound lane and collided with Boone's vehicle, which emerged going in the other direction.

Defendant exhibited signs of being under the influence of alcohol, but field sobriety tests could not be administered because his leg was trapped under the dashboard of the Expedition. Defendant was extricated from the vehicle and flown to a hospital, where a sample of his blood was drawn sometime between 9:27 and 9:55 a.m. that morning. Prosecution analysis of the blood sample found an alcohol content of .10 percent; defense analysis found .09 percent. The prosecution's expert estimated that defendant had a blood-alcohol content of .154 at the time of the accident; defendant's expert estimated .16.

Defendant had completed an 18-month alcohol abuse treatment program three months before the accident. Records showed that he never missed a class in the program. The program counselor, Herman Uquillas, testified that the main point of the treatment was to underscore the risks of driving under the influence. Uquillas said that he told defendant 26 times face-to-face and 12 times in classes about the risk to life created by drunk driving, and warned him that killing someone while driving under the influence could constitute murder. Defendant signed a plea form in one of his prior drunk driving

cases in which he acknowledged that "it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving, someone is killed, I can be charged with murder."

Uquillas testified that "when you are with alcohol in your body, your judgment goes away," and defendant's expert on the effects of alcohol, Kenton Wong, testified that alcohol drinkers have " 'reduced inhibition' "and "may take risks that they wouldn't normally take . . . ." Wong said that it would not be unusual for someone waking up with a high blood-alcohol content to "not be able to accurately assess how intoxicated he is, to feel like he was fine to drive." Richard Bowden, the prosecution's blood-alcohol analyst, testified that a person driving under the influence of alcohol could be inclined to take more risks.

A highway patrol officer who inspected the Expedition for the prosecution found no pre-existing mechanical problems that could have caused the accident. Approximately two pounds of methamphetamine were found under the back seat.

The jury was instructed in accordance with CALCRIM No. 520 that defendant did not act with implied malice unless, "[a]t the time he acted, he knew his act was dangerous to human life," and "[h]e deliberately acted with conscious disregard for human life." In closing argument, defendant's counsel described him as "the poster boy . . . for gross vehicular manslaughter, not murder." Counsel argued that defendant was "too impaired" from intoxication "to understand the risks that he was creating . . . when he got into the car to drive." The prosecution argued that defendant "actually subjectively knew that his actions could kill somebody."

The jury deliberated less than two hours before rendering the verdicts.

II. DISCUSSION

A. Jury Instruction

(1) Record

Highway Patrol Officer Shauna Wooden was dispatched to the hospital to obtain defendant's blood sample. She testified that a phlebotomist was unable to obtain

sufficient blood for a sample from veins in defendant's hands and feet, and that a doctor was called in to draw blood from a femoral artery. Wooden noted in her report that the phlebotomist used a nonalcoholic swab to cleanse the area before inserting the needle. Wooden said that the doctor "would have used a nonalcoholic swab as well," although that fact was not noted in her report.

Blood analyst Bowden testified on cross-examination that California regulations require the use of nonalcoholic swabs because alcohol on the swab might affect the test results. He also agreed that the regulations required that blood be drawn from a vein.

The court refused to give the following jury instruction requested by the defense: "In evaluating blood test results, you may consider whether the person who collected the blood sample used for testing blood-alcohol concentration followed the regulations of the California Department of Health Services. [¶] The California Department of Health Services regulations state that a venipuncture shall be used to collect a blood sample from a living person. A venipuncture punctures a vein and collects venous blood, not arterial blood. [¶] The California Department of Health Services also requires that Alcohol or other volatile organic disinfectant shall not be used to clean the skin where a specimen is to be collected. Aqueous benzalkonium chloride (zephiran), aqueous merthiolate or other suitable aqueous disinfectant shall be used."

Defense counsel referred in closing argument to the testimony on this subject as follows:

"Officer Wooden . . . doesn't mark down whether or not the doctor did what the law requires, and use a non-alcohol swab. She has no idea.

"No idea. Her response . . . to that question was that, 'Well, he would have used one that wasn't.'

"Was, 'He would have,' you know, a year and a half later, what does that mean?

"She noted specifically the nurse did it, but she didn't note the doctor did anything of the kind, so does that mean at the time she was not being honest and didn't put down an observation she didn't see?

"I mean, what does that mean? You know, this is a little bit too important for that kind of junk testimony to be relied on.

"You've got to give Mr. Soto the benefit of the doubt on these things, and you were told by their expert that if in fact the doctor used an alcohol swab, and we don't know the answer to that, but if he did, it would skew the test.

"We also know that arterial blood was taken in violation of the law, according to the prosecution expert, Mr. Bowden, so . . . even . . . basic things like taking a blood sample in this case . . . the level of the evidence, I just wonder . . . who would walk out of this courtroom feeling like they have been treated fairly when you've got the law being violated just in collecting blood samples . . . ."

The prosecution described this line of argument and others from the defense as merely "blow[ing] smoke." The prosecutor submitted:

"[Defense counsel] wants to hope to create something in your minds to cause you to speculate about things. . . .

"[L]ike the smoke that he did on the femoral blood versus venous blood at the time they removed the blood from the defendant at North Bay Medical Center, and . . . they should have gotten venous blood instead of arterial blood because the doctor, they couldn't get a vein; you had to take it from the artery. That's what happened out there.

"So he doesn't offer any evidence to say that anything is wrong with that, or you get a different BA just because you took arterial blood; he doesn't offer any evidence to say that there's a problem with this blood test.

"In fact, he concedes, his guy was over a .08. He basically concedes the goodness of the test itself and how it was drawn when he concedes the 23153's and the 191.5. It's just smoke. . . . [I]f you really want to know, 'Hey guys. Is there a problem that the doc did a femoral artery draw as opposed to getting it out of a vein?'

" 'Mr. Wong, is that a problem?' His own expert.

"Mr. Bowden, who is the DA expert, 'Is there a problem?'

"How about Dr. Gill?[1] Ask him. 'Well, doctor, if they took arterial blood from a defendant who is suspected to be DUI and didn't take any venous blood, are you going to get a different result?'

"He doesn't bother putting that on or bother asking questions. What he's doing, he's trying to suggest to you something. He wants you to speculate. That's smoke. Don't be confused by things like this."

(2) Analysis

A defendant is generally entitled upon request to a "pinpoint" jury instruction relating particular facts to a legal issue that goes to the crux of the defense case or is relevant to the question of reasonable doubt. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Henderson* (2003) 110 Cal.App.4th 737, 741.) The defense theory must be supported by substantial evidence and not mere speculation. (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Waidla* (2000) 22 Cal.4th 690, 735.) Prejudice from an erroneous failure to give a pinpoint instruction is determined under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Earp* (1999) 20 Cal.4th 826, 887.)

The blood sample in defendant's case was not obtained in compliance with the regulations insofar as they require that blood be taken from a vein, rather than an artery, and Officer Wooden's failure to record whether the doctor had used a nonalcoholic swab might arguably have supported a finding that this requirement of the regulation was violated as well. However, while there was substantial evidence that the regulations were violated, there was no evidence, as the prosecutor pointed out, that the violation affected the reliability of the blood test results. Defendant offered no proof that the regulatory violation called into question whether he was in fact driving under the influence when the accident occurred; instead, he conceded that fact in holding himself out as the "poster boy" for gross vehicular manslaughter while intoxicated. Thus, while regulatory

[1] Dr. Thomas Gill performed Boone's autopsy.

violations are generally relevant in determining the weight to which blood test results are entitled (*People v. Williams* (2002) 28 Cal.4th 408, 414; *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1186-1187 (*Roze*)), they were essentially irrelevant here (compare *Roze*, *supra*, at pp. 1188, 1189 [violations called into question accuracy of test results and could have produced a false positive]). Since no evidence supported a theory that failure to comply with the regulations rendered the blood test results unreliable, and the theory neither went to the crux of the defense case nor raised a reasonable doubt as to defendant's guilt, the pinpoint instruction was properly refused.

Defendant was not prejudiced by failure to give the instruction in any event. As just explained, the defense did not hinge on the unreliability of the blood test results. To the contrary, those results were *helpful* to the defense on the central issue of implied malice insofar as they established that defendant had a high level of intoxication that might have prevented him from forming the necessary mental state for murder. Hence, defendant called his own expert to opine that he had a blood-alcohol content of .16 at the time of the accident. As defense counsel explained to the jury, "So why did the defense have [Wong] come in to testify? [¶] And you probably already have guessed it; it all goes directly to the question of my client's mind state. It's really the question of, is this an implied malice murder case, or is this a vehicular gross manslaughter case?"

Moreover, as the People observe, the evidence of implied malice was very strong in defendant's case. Defendant was seen driving in an extremely dangerous manner immediately before the accident. He was highly intoxicated. More than most, he should have appreciated the risks he was taking with human life. He had three prior convictions for driving under the influence, and had signed a plea form confirming that he knew the risks his conduct posed, including the possibility of a murder charge if such behavior continued. He had recently completed an 18-month treatment program where he was informed at least 38 times about the dangers of drunk driving. It is very unlikely that a trier of fact would have found that defendant had forgotten all of this experience when he got behind the wheel on the day he killed Kent Boone.

For these reasons, any error in failing to give the instruction in question was harmless under any standard.

B. Lesser Included Offenses

Defendant contends, the People concede, and we agree that the convictions of driving under the influence of alcohol causing injury (count 2), and driving with blood alcohol of .08 percent causing injury (count 3) must be reversed because they are lesser included offenses of gross vehicular manslaughter while intoxicated (count 6). The enhancements found with respect to counts 2 and 3 must also be reversed.

III. DISPOSITION

The judgment is modified to strike the convictions on counts 2 and 3, and the true findings on the special allegations as to those counts. As so modified, the judgment is affirmed. The trial court is directed to prepare and forward an amended abstract of judgment reflecting the modification to the Department of Corrections and Rehabilitation.

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Marchiano, P.J.

We concur:

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Margulies, J.

_____
Dondero, J.